BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF DON MacKENZIE, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 77-70 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This appeal came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, on April 28, 1978, in Seattle, Washington. Hearing examiner William A. Harrison presided. A proposed order was entered; exceptions to such order and replies to exceptions were received. Subsequently, hearing was reopened on motion of the respondent, and was held before hearing examiner William A. Harrison, presiding alone, on November 2, 1978, in Spokane, Washington. Transcripts of both hearings were obtained and all members of the Hearings Board, including David A. Akana, have heard or read the

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evidence presented at both hearings. The final transcript was received by the Hearings Board on November 21, 1978. Appellant appeals from an order of the Department requiring him to limit his irrigation use of water from Fry Lake to 9 of his 37 acres.

Appellant appeared by and through his attorney, Kelly Hancock; respondent appeared by and through its attorney, Robert V. Jensen, Assistant Attorney General. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Olympia court reporter Susan Cookman recorded the proceedings.

Having heard or read the testimony, having examined the exhibits, having heard or read the arguments of counsel and being fully advised, the Hearings Board makes and enters the following

FINDINGS OF FACT

I

In the spring of 1903, James A. Stoddard, a U. S. Civil War veteran, took up residence on 160 acres in Okanogan County, Washington, with the intention of perfecting a "soldiers' homestead." He perfected that homestead in 1906 and thus became entitled to a patent of the 160 acres from the United States. The written, homestead-proof testimony of Stoddard and of a witness, Proctor, specifies that there was a well with pump by 1906 (Exhibit A-4).

This appeal concerns a 37-acre portion of the original Stoddard homestead (SW1/4 of SE1/4 of Sec. 10, T. 34 N., R. 26 EWM, see Exhibit R-13), which abuts Fry Lake at the northeast corner of the property. Fry Lake has ten or less acres of surface area and, like the nearby Duck Lake, is a "pothole" lake created by glaciation. Running uphill from Fry

Lake and onto the upper benches of the 37-acre tract there was, until recently, a wood-stave and wire pipe which terminated at a grid-work of flumes and ditches (rills). Appellant testified that this grid-work was sufficient to irrigate some 31 acres. At the lake end of the wood-stave pipe, there is a hand dug, timber-reinforced well which measures about 4 feet square and 12 feet deep (Exhibit R-23). We take official notice that the type of construction used in the flume, pipe and well is very old and was known and used in the early part of this century. The well was built to provide deep water for priming a pump which, in turn, would direct water uphill through the wood-stave pipe. Although an electric pump was put into service in 1925, a gasoline pump was on the premises prior to that year. The primary source of water to fill the well, when built, was Fry Lake which, if it did not cover the well, could be made to fill it by means of a short ditch.

II

In 1925, Grace A. MacKenzie, who now owns the 37 acres in question, but who did not then, observed orchard over the entire property excepting a strip measuring approximately 150 x 500 feet in the southwesterly portion. This orchard was at least 15 years old at that time indicating that it was planted in approximately 1910. This is corroborated by the testimony of Leonard Fry; and, further, by testimony of Albert East who observed small apple trees both on the upper benches and near Fry Lake, on the subject property, in 1911. We find that this orchard was irrigated by withdrawal of water from Fry Lake by means of the flumes, rills, wood-stave pipe, hand dug well and pump cited in Finding of Fact I, above. From all the evidence before us, including the extent of orchard observed by eyewitnesses, the extent of the early-day irrigation system on the

property and the untillable portions taken up by roads or slopes, we find that 30 acres of orchard were planted upon the property in approximately 1910, and were irrigated by withdrawals of water from Fry Lake thereafter until at least 1925.[1] This 30 acres included the three acres which now lie between the Irrigation District Canal and Fry Lake.

III

In 1924, the federal government completed an irrigation canal from the Conconully Reservoir southward into the area concerned in this appeal. This project was turned over to the Okanogan County Irrigation District (see chapter 87.03 RCW) in that year. Water from this canal is brought to fields in the area, and is also stored in Fry and Duck Lakes.

In 1974, studies by the Department of Ecology (DOE) led to the conclusion that water from the Irrigation District's canal constituted a major source of recharge for the ground water supply in the region of Fry and Duck Lakes. See WAC 173-132-010. Furthermore, the Department has concluded that there is hydraulic continuity between the pothole lakes, such as Fry and Duck, and the underlying ground water. Finding that the natural waters of the region may have been over-appropriated, the Department created the "Duck Lake Ground Water Management Subarea"

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1. Records of the Okanogan County Assessor for 1926 conflict with the extent of orchard which we find to have existed on the subject property in 1925. There was no evidence, however, that Assessor's records of that era were compiled by actual site inspection. In addition, Assessor's records for the same property in a later year, 1932, are self-conflicting. Exhibit R-8 lists the entire 37 acres as "unimproved" while Exhibit R-11 lists 12 acres improved and 25 acres unimproved, both compiled for the year 1932.

(chapter 173-132 WAC and RCW 90.44.130) in 1974 for the purpose of working out a ground water management program especially suited to that region. WAC 173-132-020. The property which is the subject of this appeal is within the Duck Lake Subarea and within the Irrigation District. Excepting domestic uses, there has been an "administrative hold" on all applications for ground or surface water permits from the DOE since first conception of the Duck Lake Subarea in 1969.

In 1975, the Irrigation District filed with the DOE a declaration of artificially stored ground water as prescribed in RCW 90.44.130. No decision has been reached, as yet, on whether or to what extent the Department will accept that declaration, as studies are still being conducted.

The determination of how much water is artificially stored and whether the remaining public water is over-appropriated constitute the main water-management tasks in the region involved in this appeal.

IV

In 1975, the appellant, Don MacKenzie, established a new pipeline from Fry Lake onto the 37-acre tract in question. Don MacKenzie is in control of the property although it is owned by his mother, Grace A. MacKenzie, who acquired title in 1957. By use of this pipeline and a pump, appellant has withdrawn water from Fry Lake to irrigate 26-27 acres of alfalfa.[2]

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2. In addition, there is an irrigation agreement for 3 acres (between the Irrigation District canal and Fry Lake) from the Irrigation District although unsatisfactory piping has prevented the use of this right.

V

In 1977, the Irrigation District became concerned about the appellant's withdrawal of water from Fry Lake, which the Irrigation District has a part in recharging. See finding of Fact III. At the request of the Irrigation District, the DOE inquired of appellant by what right he made his withdrawal. Appellant pointed out a "Water Right Claim" (Exhibit R-24) made under chapter 90.14 RCW, the Water Rights Claim Act of 1967. That document claims a right to irrigation of the 37 acres in question from Fry Lake, at 250 gallons per minute, and is dated June 26, 1974. The claim was written and signed by Grace A. MacKenzie who believed that 250 gallons per minute was the appropriate quantity for 37 acres because of advice she had received from the Irrigation District. No irrigation from Fry Lake took place on the subject property during 1974, the year the claim was filed.

From a study of some, but not all, of the evidence later presented at the hearing before this Board, the Department concluded that:

> In the interest of reaching an interim interpretation of the extent and priority of the Don MacKenzie water right, the following interpretations are made:
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> 1. The total number of acres within the SW1/4SE1/4 of Section 10 to be recognized as being irrigated from Fry Lake shall be limited to 9 acres. Those acres lying and being above the irrigation district ditch. An additional 3 acres can be irrigated with water from the irrigation district facilities below the ditch.
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> 2. The maximum rate of diversion, which can be acknowledged, shall not exceed 250 GPM, as documented by Water Right Claim No. 129316.
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> 3. The annual water duty is established as 4 acre-feet per acre or a total of 36 acre-feet per season. This would allow up to 33 twenty-four pumping periods on the 9 acres.

4. The priority date of this vested water right shall be set as 1906.

As a closing note, it must be stated that a final disposition of the extent and priority of any vested water right rests with the Superior Court of the county. The Department of Ecology has made an attempt to render a management decision for the purposes of water regulation in the absence of a Superior Court decision because of the extreme competition for water in the Duck Lake Subarea.

Appellant received the document (Exhibit R-21) including the above wording together with a regulatory Order, DE 77-1003 (Exhibit R-25) requiring adherence to that reduction in water withdrawal, indefinitely, at peril of monetary civil penalties. From that Order, appellant appeals.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

In issuing the appealed order, DOE assessed the rights of appellant. This difficult task was made without the guidance of a general adjudication of the water rights in that locality, as set out in the Water Code of 1917 (RCW 90.03.100-.240). Nevertheless, DOE could act to ascertain the appellant's water right as it did here. This is so because of the language of RCW 43.21.130 which states that DOE ". . . shall regulate and control the diversion of water in accordance with the rights thereto . . .".

There is no authority for the proposition that water rights do not begin until the adjudication specified in the Water Code of 1917 supra, nor is the statutory mandate to DOE that it shall regulate water only in accordance with adjudicated rights.

Next, this Hearings Board has jurisdiction to hear and decide appeals from any person aggrieved by an order of DOE, RCW 43.21B.110. It follows, therefore, that in testing the merits of the appealed order, this Hearings Board must also assess the apparent rights of the appellant. This is not a general adjudication as accorded to the superior courts by the Water Code of 1917, supra. Scheibe v. Department of Ecology, PCHB No. 36 (1972). Neither is the general adjudication of the Water Code of 1917 the exclusive procedure by which a water right may be brought under scrutiny. State ex rel. Roseburg v. Mohar, 169 Wn. 368, 13 P.2d 454 (1932), Pate v. Peterson, 107 Wn. 93, 180 P. 894 (1919) and Waters of Crab Creek, In re, 194 Wn. 634, 79 P.2d 323 (1938).

II

The key question for decision in this appeal is whether appellant has a right to withdraw water from Fry Lake and, if so, for what acreage. We now conclude that the appellant has a right to withdraw water from Fry Lake and in the following Conclusions of Law we set forth the acreage and the rationale.

Riparian rights have existed in Washington from the earliest days. In 1891, the state legislature enacted that: "the common law, so far as it is not repugnant to or inconsistent with, the constitution and laws of Washington state nor incompatible with the institutions and

condition of society in this state, shall be the rule of decision in all courts of this state" (Code Proc. § 108).[3] In Benton v. Johncox, 17 Wash. 277 (1897) the Washington State Supreme Court expressly declared that the common law doctrine of riparian rights is not thus inconsistent nor incompatible. That case has never been overruled.

Riparian land is that which abuts either a river or a lake.[4] The appellant is therefore a riparian proprietor and the extent of his rights as such were first enunciated in Benton, supra. The Washington State Supreme Court quoted with approval from a California case:

> "By the common law" says the court in Lux v. Haggin, 69 Cal. 255, 390 (10 Pac. 753), "the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners, for purposes hereafter to be mentioned." P. 281

The Washington State Supreme Court then noted that "one of the purposes thereafter mentioned was irrigation."

This definition of riparian right was later qualified in Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923). Whereas the stream at issue in Benton, supra, could not supply the combined withdrawals of the riparian and non-riparian adversaries; in Brown, there was ample surplus after riparian withdrawal to fully support the proposed withdrawal by non-riparians. The Washington State Supreme Court then stated (Brown,

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3. See also Laws 1863, p. 88, Territorial Legislature.

4. Botton v. State, 69 Wn.2d 751, 420 P.2d 352 (1966).

p. 553):

> . . . waters of non-navigable streams in excess of the amount which can be beneficially used, either directly or prospectively within a reasonable time, or, or in conjunction with riparian lands, are subject to appropriation for use on non-riparian lands.[5]

Unfortunately, Brown gives no definition of "reasonable time" nor the point in time from which to measure it. The definition of "reasonable time" was taken to be "two or three years" by the 9th U. S. Circuit Court of Appeals, U.S. v. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir., 1964), but the far more critical question of the point in time from which it is measured went unanswered. In State v. American Fruit Growers, 135 Wash. 156, 237 Pac. 498 (1925) and In re Sinlahekin Creek, 162 Wash. 635 (1931), the Washington State Supreme Court reaffirmed the "reasonable time" rule of Brown without further clarification.

Writing in the Washington Law Review,[6] Professor Ralph W. Johnson proposes that the point in time from which the "reasonable time" in Brown is measured is June 6, 1917, the effective date of the Water Code, chapter 90.03 RCW.[7] This, he reasons, is what was meant by the Water Code where it states:

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5. The identical rule was applied to non-navigable lakes in Proctor v. Sim, 134 Wash. 607 (1925). Fry Lake is non-navigable and thus the rule is applicable in this appeal.

6. Johnson, Riparian and Public Rights to Lakes and Streams, 35 WASH. L. REV. 580, 590-95 (1960).

7. This was also the position taken by the Attorney General in his brief in In re Silahekin Creek, supra, although, as we have said, the Washington State Supreme Court did not address the question of the point in time from which "reasonable time" is measured. The Attorney General has taken conflicting positions on this question over the years. See Op. Wash. Att'y. Gen. 500, 505-507 (1927-1928).

> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240. (Emphasis added.) RCW 90.03.010.

We conclude that (1) a riparian right of withdrawal exists only to the extent that it was exercised prior to a reasonable time after enactment of the Water Code (effective date June 6, 1917), chapter 90.03 RCW,[8] and (2) three years is a reasonable time under most circumstances. A riparian right of withdrawal commences on, and has as its priority date, the date on which a patentee made entry onto the land for the purpose of obtaining a patent. Benton v. Johncox, supra, at p. 288. The general rule to be followed in determining a riparian right to withdrawal, therefore, is to ascertain the extent of withdrawals by the patentee or his successors in title between entry onto the land and June 6, 1920. This general rule is applicable to this matter.

In this appeal, the date of entry, and priority, is May, 1903, and

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8. For an excellent background to this area, see Corker and Roe, Washington's New Water Rights Law--Improvements Needed, 44 WASH. L. REV. 85, 106-128 (1968). In that article, the authors take a view of riparian rights which is more expansive than is taken here and list six separate interpretations of Brown "reasonable time", including their own and the one which we take today.

withdrawal was made from Fry Lake for irrigation of 30 acres prior to and through June 6, 1920. (See Finding of Fact II.) Grace A. MacKenzie, as the current owner of the 37 acres of riparian land now in question, and appellant claiming through her, therefore hold a riparian right to irrigate 30 acres of that land for agricultural use.

III

Regarding the "Water Right Claim" filed in 1974 (see Finding of Fact V) we turn to the following language from the Act pursuant to which that claim was filed:

> The filing of a statement of claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one or more water use claimants and another or others. RCW 90.14.081.

While failing to file a statement of claim altogether shall result in relinquishment of certain water rights, RCW 90.14.071, the details set forth in a statement of claim, such as quantity, acreage, and priority are not controlling in an adversary hearing before this Board or a court. The conclusions which we reach herein are within that statement of claim.

IV

In this appeal, the DOE has not elucidated the legal status of Irrigation District water stored in Fry Lake, which is a natural, pothole lake. Assuming, that this stored water is beyond the reach of a riparian such as appellant, nevertheless, there has been no accurate determination o the quantities of each source of water in Fry Lake, which would be the first step in segregating the withdrawals.

Not having shown what specific quantity of water in Fry Lake, if any, is legally beyond the reach of riparians because of artificial storage; and, not having shown that the natural waters of the lake are over-appropriated, or if so, that appellant's priority is so low relative to others as to require that he be regulated, the Department of Ecology's Order is not well founded in view of the appellant's established riparian right for irrigation of 30 acres. The Order must therefore be vacated.

V

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The Department of Ecology Order now before us, Docket Number DE 77-1003, is hereby vacated.

DONE at Lacey, Washington this 1st day of March, 1979.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney

DAVE J. MOONEY, Chairman

(SEE DISSENT)

CHRIS SMITH, Member

David A. Akana

DAVID A. AKANA, Member

SMITH, Chris (dissenting)--I disagree with the majority of the Board. The evidence, taken as a whole, fails to show that more than 12 acres were irrigated during the period which ended in 1920, when appellant's riparian rights were established.

CHRIS SMITH, Member